

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 21, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON, STATE
OF OREGON, STATE OF ARIZONA,
STATE OF COLORADO, STATE OF
CONNECTICUT, STATE OF
DELAWARE, STATE OF ILLINOIS,
ATTORNEY GENERAL OF
MICHIGAN, STATE OF NEVADA,
STATE OF NEW MEXICO, STATE
OF RHODE ISLAND, STATE OF
VERMONT, DISTRICT OF
COLUMBIA, STATE OF HAWAII,
STATE OF MAINE, STATE OF
MARYLAND, STATE OF
MINNESOTA, and
COMMONWEALTH OF
PENNSYLVANIA,

Plaintiffs,

v.

UNITED STATES FOOD AND
DRUG ADMINISTRATION,
ROBERT M. CALIFF, in his official
capacity as Commissioner of Food and
Drugs, UNITED STATES
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, and XAVIER
BECERRA, in his official capacity as
Secretary of the Department of Health
and Human Services,

NO. 1:23-CV-3026-TOR

ORDER DENYING MOTION TO
INTERVENE

Defendants.

BEFORE THE COURT are Proposed State Plaintiff-Intervenors' Motion to Intervene (ECF No. 76), Motion to Appear Pro Hac Vice re Attorney: Joshua N. Turner (ECF No. 77), Motion to Appear Pro Hac Vice re Attorney: Peter M. Torstensen, Jr. (ECF No. 79), Motion to Appear Pro Hac Vice re Attorney: Thomas T. Hydrick (ECF No. 85), Motion to Appear Pro Hac Vice re Attorney: Eric H. Wessan (ECF No. 87), Motion to Appear Pro Hac Vice re Attorney: Leif A. Olson (ECF No. 88), and Motion to Appear Pro Hac Vice re Attorney: Christopher A. Bates (ECF No. 89). These motions were submitted for consideration without oral argument. The Court has reviewed the record and files herein, the completed briefing, and is fully informed.

BACKGROUND

On March 3, 2023, Plaintiffs filed an Amended Complaint, seeking the following relief: (1) "Declare ... that mifepristone is safe and effective and that Defendants' approval of mifepristone is lawful and valid;" (2) "Declare ... that the mifepristone REMS violated the Administrative Procedures Act;" (3) "Declare ... that the mifepristone REMS violated the United States Constitution;" (4) "Enjoin Defendants ... from enforcing or applying the mifepristone REMS;" (5) "Enjoin Defendants ... from taking any action to remove mifepristone from the market or

1 reduce its availability;” and (6) “Award such additional relief as the interests of
2 justice may require.” ECF No. 35 at 90.

3 On March 30, 2023, the Proposed State Plaintiff-Intervenors (“State
4 Intervenors”) filed the present Motion to Intervene, seeking to intervene as a matter
5 of right, or alternatively, through permissive intervention. *See* ECF No. 76. State
6 Intervenors seek to file a Complaint, claiming the following relief: (1) “Adjudge
7 and declare ... that the FDA’s final agency action on January 3, 2023 modifying
8 the mifepristone REMS violated the notice-and-comment requirements under the
9 Administrative Procedure Act[;]” (2) “Adjudge and declare ... that the FDA’s final
10 agency action on January 3, 2023 modifying the mifepristone REMS is arbitrary,
11 capricious, an abuse of discretion, or otherwise not in accordance with law under
12 the Administrative Procedure Act;” (3) “Adjudge and declare ... that the FDA’s
13 final agency action on January 3, 2023 modifying the mifepristone REMS exceeds
14 the statutory authority granted to the FDA under the FDCA;” (4) “Enjoin
15 Defendants ... from enforcing or applying the January 3, 2023 mifepristone
16 REMS;” (5) “Vacate the FDA’s January 3, 2023 final agency action;” and (6)
17 “Award [State Intervenors] such additional relief as the Court may deem just,
18 proper, and necessary, including their attorneys’ fees and costs associated with this
19 litigation.” ECF No. 76-1 at 20.

1 On April 7, 2023, this Court preliminarily enjoined Defendants from altering
2 the status quo and rights as it relates to the availability of Mifepristone under the
3 current operative January 2023 Risk Evaluation and Mitigation Strategy under 21
4 U.S.C. § 355-1 in Plaintiff States and the District of Columbia. ECF Nos. 80, 91.

5 Following this Court’s preliminary injunction, the State Intervenor filed a
6 Motion to Expedite the Court’s consideration of the Motion to Intervene, which the
7 Court granted. ECF Nos. 90, 96. Both parties oppose the Motion to Intervene.
8 ECF Nos. 92, 93. State Intervenor timely filed a reply. ECF No. 103.

9 DISCUSSION

10 I. Intervention as of Right

11 “On timely motion, the court must permit anyone to intervene who... claims
12 an interest relating to the property or transaction that is the subject of the action,
13 and is so situated that disposing of the action may as a practical matter impair or
14 impede the movant's ability to protect its interest, unless existing parties adequately
15 represent that interest.” Fed. R. Civ. P. 24(a)(2). Thus, the applicant seeking to
16 intervene must show (1) timeliness, (2) a significantly protectable interest relating
17 to the subject of the action, (3) that interest is subject to impairment by disposition
18 of the case, and (4) the interest is not adequately represented by the parties. *W.*
19 *Watersheds Project v. Haaland*, 22 F.4th 828, 835 (9th Cir. 2022). The
20 requirements are interpreted broadly in favor of intervention and review “is guided

1 primarily by practical considerations, not technical distinctions.” *Id.* (citation
2 omitted). A failure to meet any element is fatal to mandatory intervention. *Perry*
3 *v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

4 “Whether an applicant for intervention as of right demonstrates sufficient
5 interest in an action is a ‘practical, threshold inquiry,’ and ‘[n]o specific legal or
6 equitable interest need be established.’” *Citizens for Balanced Use v. Montana*
7 *Wilderness Ass’n*, 647 F.3d 893, 897 (9th Cir. 2011) (citation omitted). The
8 interest must be “protectable under some law” with a “relationship between the
9 legally protected interest and the claims at issue.” *Id.* A relationship exists “if the
10 resolution of the plaintiff’s claims actually will affect the applicant.” *Donnelly v.*
11 *Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (citation omitted).

12 State Intervenor contend they have “significantly protectable interests
13 related to the FDA’s decision to modify mifepristone’s REMS.” ECF No. 76 at 4.
14 Specifically, (1) “eliminating mifepristone’s in-person dispensing requirement will
15 harm women residents of the State Intervenor”; (2) “FDA’s action undermines
16 the State Intervenor’s ability to enforce their laws” and (3) “FDA’s action violates
17 the Administrative Procedures Act[.]” ECF No. 76 at 4–5.

18 It is not enough that both groups assert APA claims against the FDA relating
19 to the 2023 Mifepristone REMS Program. *Donnelly v. Glickman*, 159 F.3d 405,
20 409 (9th Cir. 1998). As a practical matter, State Intervenor’s claims are not at

1 issue in this case. *See* ECF No. 76-1. State Intervenor challenge the 2023 REMS
2 on the grounds that the in-person dispensing requirement should not have been
3 removed. *See id.* The in-person dispensing requirement is not at issue in this case,
4 and will neither be eliminated nor reinstated as a result of this litigation.
5 Moreover, this case will not impair State Intervenor’s ability to enforce their own
6 state laws regulating medication abortion. *See Am. Coll. Of Obstetricians &*
7 *Gynecologists v. United States Food & Drug Admin.*, 467 F. Supp. 3d 282, 289 (D.
8 Md. 2020) (“[T]he resolution of this case will not eliminate any state’s ability to
9 continue to regulate medication abortion, as they choose, above and beyond the
10 FDA’s requirements.”).

11 Therefore, resolution of this case will not affect State Intervenor’s claims
12 that FDA should have more restrictive limitations than the 2023 REMS nor will
13 this litigation impede State Intervenor’s own laws. State Intervenor do not have a
14 “significant protectable interest” that has a sufficient relationship to the claims at
15 issue in this case. On this ground alone, intervention as a matter of right fails.

16 II. Permissive Intervention

17 “On timely motion, the court may permit anyone to intervene who... has a
18 claim or defense that shares with the main action a common question of law or
19 fact.” Fed. R. Civ. P. 24(b)(1)(B). Even if satisfied, district courts have discretion
20 to deny permissive intervention. *Cooper v. Newsom*, 13 F.4th 857, 868 (9th Cir.

1 2021), *cert. denied sub nom. San Bernardino Cnty. Dist. Att’y v. Cooper*, 143 S.
2 Ct. 287 (2022).

3 State Intervenor’s assert their “APA claims are grounded in the same facts
4 and the same laws as the existing Plaintiffs’ action.” ECF No. 76 at 7. However,
5 in practical application, this is not true. The question in this case is whether the
6 January 2023 REMS violates the APA by imposing patient agreement form,
7 provider certification, and pharmacy certification requirements. *See* ECF No. 35.
8 The question State Intervenor’s pose is whether the January 2023 REMS violates
9 the APA by *not* imposing an in-person dispensing requirement. *See* ECF No. 76-1.
10 As a result, the Court finds there is no common question of law or fact within the
11 meaning of Rule 24(b). Moreover, the addition of State Intervenor’s who allege
12 claims and relief not at issue would cause additional delay in this complex
13 litigation. *Cooper*, 13 F.4th at 868.

14 As a result, the Court declines to permit State Intervenor’s to intervene in this
15 case. Fed. R. Civ. P. 24(b). As the above findings are dispositive, the Court
16 declines to address the remaining arguments. State Intervenor’s Motion is denied.

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ACCORDINGLY, IT IS HEREBY ORDERED:

1. Proposed State Plaintiff-Intervenors' Motion to Intervene (ECF No. 76) is **DENIED**.
2. Motion to Appear Pro Hac Vice re Attorney: Joshua N. Turner (ECF No. 77) is **GRANTED**.
3. Motion to Appear Pro Hac Vice re Attorney: Peter M. Torstensen, Jr. (ECF No. 79) is **GRANTED**.
4. Motion to Appear Pro Hac Vice re Attorney: Thomas T. Hydrick (ECF No. 85) is **GRANTED**.
5. Motion to Appear Pro Hac Vice re Attorney: Eric H. Wessan (ECF No. 87) is **GRANTED**.
6. Motion to Appear Pro Hac Vice re Attorney: Leif A. Olson (ECF No. 88) is **GRANTED**.
7. Motion to Appear Pro Hac Vice re Attorney: Christopher A. Bates (ECF No. 89) is **GRANTED**.

The District Court Executive is directed to enter this Order and furnish copies to counsel.

DATED April 21, 2023.



Thomas O. Rice
THOMAS O. RICE
United States District Judge